No. 75-1439

In the Supreme Court of the United States

OCTOBER TERM, 1975

JERRY LEE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not yet reported. The order of the district court (Pet. App. A4-A6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1976. On March 9, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including April 12, 1976, and the petition was filed on April 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the absence of a state statute prohibiting distribution of obscene materials to adults prohibits

federal prosecution under 18 U.S.C. 1461 for mailing obscene materials entirely within that state.

2. Whether 18 U.S.C. 1461 is unconstitutionally vague as applied.

3. Whether prospective jurors should have been questioned on *voir dire* as to their knowledge of contemporary community standards for determining whether allegedly obscene materials, taken as a whole, appeal to prurient interest.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on seven counts of mailing obscene material, in violation of 18 U.S.C. 1461. He was sentenced to concurrent terms of three years' imprisonment, with thirty months of that term suspended, and to concurrent three years' probation on each count. The court of appeals affirmed *per curiam* (Pet. App. A1-A3).

The evidence at trial[1] showed that between February and October 1974, petitioner mailed various issues of "Intrigue" magazine and other pamphlets from Des Moines, Iowa, to addresses in Mount Ayr and Guthrie Center, Iowa.[2] The magazines depict nude males and females engaged in masturbation, fellatio, cunnilingus, and sexual intercourse. On separate occasions in July 1974, petitioner mailed two films entitled "Lovelace" and "Terrorized Virgin," to Mount Ayr, Iowa. "Lovelace"

[1]The evidence at trial is not transcribed. The above summary of facts is drawn mainly from the Agreed Statement of the record on appeal filed in the court of appeals under Rule 10(d), Fed. R. App. P.

[2]All of the materials here involved were the subject of test purchases by postal authorities in Mount Ayr and Guthrie Center (Pet. 5-6).

depicted acts of masturbation and simulated acts of fellatio, cunnilingus, and sexual intercourse. "Terrorized Virgin" depicted two nude males and a nude female engaged in fellatio, cunnilingus, and intercourse.

ARGUMENT

1. Iowa prohibits distribution of obscene material only to minors, not to adults.[3] Petitioner argues (Pet. 8-18) that, in consequence, contemporary community standards within that state cannot be offended by distribution of obscene materials to adults; therefore, no federal obscenity prosecution under 18 U.S.C. 1461 for mailings of such materials wholly within the state is constitutionally permissible.

Petitioner misapprehends the function of the "contemporary community standards" element in the three-part test which guides triers of fact in both state and federal obscenity prosecutions. *Miller* v. *California*, 413 U.S. 15, 24; *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 129-130. That element controls the factual determination "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest * * *." *Miller* v. *California*, *supra*, at 24. This is a factual test of the aim, effect and scope of the materials, not an inquiry into whether, as a matter of local community standards, distribution of materials found to have a prurient appeal should be tolerated.

The latter inquiry involves a quite different question of legislative policy, which is to be determined by the federal and state governments within their respective constitutional spheres of responsibility. Exclusion from the

[3]Section 725.2, Iowa Code Annotated (1975) (see Pet. App. A7-A10).

mails of material deemed offensive is a national responsibility that does not depend on state policy. See *United States* v. *Orito*, 413 U.S. 139, 144, n. 6.

Thus as was observed with respect to a similar claim (*United States* v. *Danley*, 523 F. 2d 369, 370 (C.A. 9), certiorari denied, No. 75-566, February 23, 1976):

> We deal with a federal law which neither incorporates nor depends upon the laws of the states. *United States* v. *Hill*, 500 F.2d 733 (5th Cir. 1974) [certiorari denied, 420 U.S. 952]. Rather, the federal law depends for its constitutionality upon definitions incorporating community standards. Community standards are aggregates of the attitudes of average people—people who are neither "particularly susceptible or sensitive . . . or indeed . . . totally insensitive." *Miller* v. *California, supra*, 413 U.S. at 33, 93 S.Ct. at 2620. The fact that a law of a state permits a given kind of conduct does not necessarily mean that the people within that state approve of the permitted conduct. Whether they do is a question of fact to be resolved by the trial court, and in this case the trial court did resolve it.[4]

See also *United States* v. *Slepicoff*, 524 F.2d 1244, 1248-1249 (C.A. 5), certiorari denied, No. 75-1226, May 24, 1976.

Petitioner's suggestion (Pet. 14) that state and federal juries would apply different "contemporary community standards" is a result of his confusion of the factual test for prurient appeal, with the issue of legislative policy toward obscenity. Iowa, as a matter of legislative policy,

[4]Although *Danley* involved interstate shipments of obscene materials, while intrastate mailings are involved here, that factor is not relevant to protection of the mails.

has determined not to make criminal the distribution of obscene materials to adults. But this is not because Iowa has decided that materials of the kind petitioner sold would not be recognized by the average person as appealing to prurient interest. It is because Iowa has decided, as a matter of legislative policy, not to bar distribution of such materials to adults. Indeed, a jury of Iowans applying the *Miller* standard in a state prosecution for distributing allegedly obscene materials to minors, under Iowa Code Sections 725.1 and 725.2 (Pet. App. A7-A8), would apply the same community standard test for prurient appeal as a jury of Iowans considering a federal prosecution under 18 U.S.C. 1461.

Moreover, a copy of the state obscenity statute was introduced at trial (Pet. App. A3). While we do not believe the admission of such evidence was necessary, it permitted the jury to consider what, if any, bearing the statute had on community standards. In these circumstances, petitioner's claim is foreclosed by the jury's verdict and provides no basis for further review.

2. Although petitioner now claims (Pet. 18-20) that 18 U.S.C. 1461 is unconstitutionally vague as applied to his case, because the jurors might have evaluated the materials subjectively, and thus unpredictably, he did not clearly raise this issue in the court of appeals. In any event, *Miller, supra*, requires that in cases under 18 U.S.C 1461, as in prosecutions under state law, jurors must be instructed to apply a standard which assesses the prurient appeal of the material from the standpoint of "the average person, applying contemporary community standards." *United States* v. *12 200-Ft. Reels of Film*, *supra*. That standard is as objective as is the "reasonable

person" test, which has become a fundamental criterion in Anglo-American law. *Hamling* v. *United States*, 418 U.S. 87, 104-105.[5]

3. Petitioner claims that on *voir dire* he should have been permitted to ask prospective jurors whether they had knowledge of contemporary community standards regarding obscenity, where they acquired such knowledge, what the standards were, and whether they had considered and understood the state obscenity statute (Pet. 20-21).

Petitioner's proposed questions concerning individual jurors' knowledge of community standards were improper. As this Court observed in *Hamling* v. *United States*, *supra*, 418 U.S. at 104-105:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.

The district court correctly applied this reasoning (Pet. App. A6):

> A contemporary community standard, by its very nature, is a varying concept. Clearly, it is the intended province of the jury to determine that standard and apply it to the facts of a given situation. Instructions were given at the close of the evidence in this case as to what constitutes a contemporary community

[5]Petitioner does not suggest that the jury was inadequately instructed in this regard, nor does he assert any reason to believe jurors disregarded correct instructions. His claim that jurors assess community standards on a "subjective whim" (Pet. 19) is speculation.

> standard and how such a standard is to be discerned. This, the Court believes, is all the law demands under the circumstances. To require the disclosure of a prospective juror's knowledge in this respect is no more required than would pretrial disclosure of a juror's concept of "reasonableness" be necessary where that standard is an essential element.[6]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]As noted, *supra*, p. 5, the state obscenity statute was introduced for the jury's consideration. Moreover, the trial judge thoroughly inquired as to possible bias or prejudice of prospective jurors (J. Tr. 9-23). The questions proposed by petitioner would have added nothing to the fairness of the trial.

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